

## European Games & Institutional Innovation: The Making of Eurojust (1996-2004)

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### Abstract:

Eurojust is the new judiciary co-operation unit of the European Union. This article analyses the decision-making process behind its creation, explained in terms of 'institutional games'. The establishment of Eurojust illustrates the specificities of European institutional configurations and the interactions occurring in Brussels among officials, judges and ministers. Moreover, it elucidates the important role of the leadership of the General Secretariat of the Council, and the socialisation and specialisation of a group with a high level of intellectual resources, willing to participate to the 'noble' task of institutional innovation. This article defines the determining factors of intense inter-institutional competition, where the Commission and OLAF adhere to autonomous and parliamentary principles. Furthermore, it takes into account the specific work undertaken by the Presidency (or Presidencies), as well as the decisive role of the Intergovernmental Conference, which, through the means of a high level of decision-making, enables specific moves to be made in the games.

**Keywords:** magistrate, European construction, political institutions and agencies, bureaucracy, organisational theory.

### Résumé :

Eurojust est le nouvel organe de coopération judiciaire en matière pénale de l'Union européenne. Cet article consiste en une sociologie de la décision de sa création, analysée en termes de « jeux institutionnels ». La genèse d'Eurojust est illustrative de certaines spécificités des configurations institutionnelles européennes et interactions bruxelloises entre fonctionnaires, magistrats et ministres. Elle donne à voir le leadership du Secrétariat général du Conseil, la socialisation et la spécialisation d'un groupe aux ressources intellectuelles élevées et intéressé au travail « noble » d'innovation institutionnelle. Cet article revient sur les effets déterminants d'une forte concurrence inter-institutionnelle avec la Commission et l'OLAF pris dans une logique autonome et parlementaire, sur le travail spécifique de la présidence ou des présidences et, enfin, sur le rôle décisif de la conjoncture de Conférence intergouvernementale qui, élevant le niveau de la décision, seule, permet certains coups.

**Mots-clés :** juge, construction européenne, institutions politiques et agences, bureaucratie, théorie des organisations.

## European Games & Institutional Innovation: The Making of Eurojust (1996-2004)

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### Introduction

Eurojust is the new EU body for judicial co-operation in penal matters. Born out of a Council decision on 28 February 2002 and located in The Hague since December 2002, it has legal personality. Its objective is to improve co-ordination between national lawyers and investigators working on serious inter-state criminal investigations by offering assistance in order to strengthen the effectiveness of the work. This article will analyse the conditions and the rationale of the development and intervention of Eurojust within the European criminal judicial area. The creation of Eurojust is the latest stage in the process of institutional judicial co-operation within the framework of the EU's third pillar – defined after the coming into force of the Maastricht Treaty (TEU) in November 1993. The stages are as follows: the introduction of Liaison Magistrates;<sup>1</sup> the creation of the European Judicial Network (1998);<sup>2</sup> and finally, Eurojust. This project seems to be currently (and for several years to come) the most 'integrated' for judicial co-operation in penal matters. In addition to the Nice Treaty (February 2001), it is mentioned in the project of the constitutional treaty signed on 29 October 2004 in Rome (Article III-273).

Unlike the project of the European Public Prosecutor, for example, the Eurojust project has been successfully completed. Many have claimed to be responsible for its

success – in France, Germany and Belgium. These multiple claims can be explained by the fact that Eurojust was nothing more than a name or a label for quite some time. Although the name was actually invented during the preparation of the Tampere European Council in 1999, the idea stems from both Helmut Kohl's suggestion for a 'European FBI' in 1991, and the creation of Europol in the Maastricht Treaty (1992). This period saw the birth of the idea of a European agency that would be the equivalent of Europol in the judicial field. To use a term from one of our interviewees, Eurojust has been 'written in the stars since Europol'.<sup>3</sup> The day following the coming into force of the Maastricht Treaty, 2 November 1993, a first initiative was mentioned as 'the origin' of Eurojust. The Belgian Minister of Justice proposed a common action establishing a 'Centre for Information, Discussion and Exchange in the field of Judicial Co-operation' (CIREJUD). The model was provided by the existing structures in the fields of Asylum (CIREA) and Immigration (CIREFI). However, this proposal only concluded in 1998 with a network of contact points called the 'European Judicial Network' (EJN).

<sup>3</sup> Former Swedish judge Hans Nilsson, then working in the Council of Europe's (Strasbourg) division of criminal issues and the management of Legal Affairs, recalled a discussion he had in 1991 on a train ride with Wolfgang Schomburg, former lawyer and then Undersecretary of State at the Senate Justice Department in the Land of Berlin (interview, July 2003).

<sup>1</sup> Common Action, 22 April 1996 (OJ, 27 April 1996).

<sup>2</sup> Common Action, 29 April 1998 (OJ, 7 July 1998).

Without re-telling the ‘heroic’ story told by many of our interviewees,<sup>4</sup> instead explaining as precisely as possible this sociology of decision-making, we have chosen a present this analysis in terms of ‘institutional games’. These games are relatively autonomous and connected – in the sense that the actors and the spaces where they develop are differentiated and they have they own rules and issues. Within these games, a single move inevitably has an effect on the way that other moves are made; whereas some moves that might work in one particular game do not always work in another. In essence, Eurojust is a product of the interaction and the unification of the moves within these games. Although some of these (five) games took place at different times, a few of them played out in the same decisive sequence, from July to December of 2000.

The first of these games is organised around the ‘organisational leadership’ (as Selznick calls it in Selznick, 1957), of the General Secretariat of the Council (GSC), which is a inconspicuous Community body, and the socialisation and specialisation of a group with a high standard of intellectual resources, interested in the ‘noble’ work of institutional creation and ingenuity. The other games are determined by many factors, including: fierce inter-institutional competition with the Commission, which subscribes to an autonomous and established governmental logic; or they are marked by the unique rhythm of the presidencies’ rotations; or determined by a specific context like the Intergovernmental Conference (IGC), which enables certain moves to be made.

This research also takes on the perspectives developed by Jamous, according to whom the role of personalities is a key

factor in processes of change, especially due to their charismatic power (Jamous, 1969). Hence, the members of the GSC are mediators or marginal actors among administrative (with a separation between national and European level here), judicial and academic fields. They surround themselves or form an alliance with candidates; for example justice officials or magistrates who hold administrative functions. Once again, in reference to Jamous’s categories, it becomes an issue of social groups and professionals espousing new values that are disharmonious when compared to a traditional system (the judicial one in this case). These new values are supposedly about Europeanisation and, more precisely, the invention of new instruments brought into use after simple interpersonal co-operation.

Therefore, this article considers an approach where individuals often play a decisive role – but one in which personal power is primarily understood through the respective involvement and position in these institutional games. From this perspective, the power of actors in the General Secretariat and, to a certain degree, the charisma that they possess is contingent upon their presence in the institutional games – with one notable exception: the IGC (simply because of its high level of decision-making). As these actors produce the formal characteristics of the organisation, they contribute to form (around themselves) spaces of negotiations and play (Friedberg 1997: 160). They both determine ‘organisational behaviour’ and are stable actors in the processes of interactions and of negotiations with regard to, respectively, Allison’s second and third models of the sociology of decision-making (Allison 1971).

<sup>4</sup> We have undertaken a dozen interviews with the actors who were involved in the creation of Eurojust, selected through a ‘snowball’ effect. This study is part of a research contract completed in May 2004 with Hélène Michel and Natacha Paris for the Mission Research Law and Justice (the mobilisation against organised crime and the institutionalisation of a European criminal judicial area, 1996-2001).

## Agenda & Guidelines: the game of the General Secretariat of the Council

The first game provides an example of the entrepreneurial role played by the General Secretariat of the Council<sup>5</sup> and its Directorate-General, Justice and Home Affairs (JHA). Since 1995, the Council Secretariat has had its own Directorate-General, which is separate from the European Commission. At the end of 1994, the new Secretary-General of the Council decided to expand the Directorate-General to full status from its previous, smaller role under the JHA Directorate (created in November 1993). While the first officer in charge was not a specialist (Deputy Permanent Representative of Belgium and former Chief Inspector of Finance), there was high-level recruitment and a high degree of judicial expertise. Charles Elsen, in charge of these issues for the Ministry of Justice in Luxembourg for thirty years and founder of TREVI,<sup>6</sup> was named Director-General. Julian Schutte, with 20 years of similar experience in the Dutch Ministry of Justice and having co-authored the Schengen Agreement, was then appointed legal director. Working closely with ministers, he contributed to forming the judicial policy of the Netherlands. The most emblematic of cases was that of Gilles de Kerchove. A teaching assistant at the Catholic University of Louvain, Head of Cabinet in the Belgian Ministry of Justice since 1989 and, as such, associated with the 1993 proposal of CIREJUD, Kerchove, who was in competition with a *maître des requêtes* of the French Council of State for the post, was appointed as Director of police and judicial co-operation in September 1995. The team was finally completed in July 1996 with

the appointment of Hans Nilsson, who was judge of the Swedish Court of Appeal, an expert on criminal law and had worked in the Council of Europe for ten years. He was hired as head of the 'Judicial Co-operation' division. The perspective is fundamentally different from that of the Commission. Adrian Fortescue – a British diplomat from the London School of Economics, seconded to the Commission since 1985, Head of Cabinet for Lord Cockfield and Commissioner for the Internal Market (1985-89) – was appointed as head of the JHA Task Force in the General Secretariat of the Commission in 1994, then as the first Director-General in 1999.<sup>7</sup> The new head of unit for 'Judicial Co-operation', Gisèle Vernimmen, came from DG Internal Market. These two senior officials do not have a judicial background.<sup>8</sup>

The events of autumn 1996 took place within this configuration. The Irish Presidency had chosen the fight against drugs as its primary theme, after the well-known journalist Veronica Guerin was murdered in Ireland by drug traffickers. Additionally, the White March in Brussels took place, with over 300,000 people gathered in protest against the Dutroux affair. Hans Nilsson recalls: 'That caused an outcry in Ireland, and they decided to devote a part of the Dublin European Council – Dublin II – to combating organised crime, and they [the Irish Presidency] had decided to call a meeting of the K4 Committee [a committee with a high level of co-ordination]'.<sup>9</sup>

During this meeting, which took place on 15 October 1996, the General Secretariat's team seized the opportunity of 'organised crime' being placed on the agenda in order to – according to some comments in one of our

<sup>5</sup> An organisation that we have also studied, see Mangenot 2003.

<sup>6</sup> The TREVI network (Terrorism, Radicalism, Extremism, International Violence) was created in Rome, 1 December 1975, and was the first European initiative in the field of police and judicial co-operation, although it was strictly intergovernmental and focused on combating terrorism. This co-operation was increased with TREVI II & III.

<sup>7</sup> He was replaced on 15 March 2003 by another Briton from the cabinet of Leon Brittan, and became Deputy Director-General of Competition, then Director-General of Press and Communication.

<sup>8</sup> The situation remained similar in 1999 when Denise Sorasio, an official in the Commission's legal service and Head of Cabinet for the President of European Parliament, was appointed director of Police and Judicial Co-operation.

<sup>9</sup> Interview with Hans Nilsson (July 2003).

interviews – ‘make the most of the event’. At the meeting, a document was passed around to certain delegations, and it suggested establishing a mutual system of evaluation concerning judicial co-operation and, above all, the creation of the Judicial Co-operation Unit (JCU). This was a window of opportunity for the General Secretariat. The document was discussed at length by the K4 Committee, but was rejected by some delegations. The idea did not come up again during the Dublin European Council of 1996, where a decision, however, was made to create a high-level group that would be in charge of leading an action programme in combating organised crime. During the Luxembourg Presidency, the group became the ‘Multidisciplinary Group on Organised Crime’ (MGD), which served to consolidate police co-operation in the fight against organised crime, and gave the MGD definitive working autonomy.<sup>10</sup>

Effectively, it is in relation to specifically judicial actors that Eurojust emerged, particularly within new confines: for example, the Council’s ‘EJN’ working group was created by the Irish Presidency during the preparation of the Dublin European Council.<sup>11</sup> During this period, new actors arrived in Brussels for various Permanent Representations, including Emmanuel Barbe, who became Legal Advisor in 1997 for France, Lorenzo Salazar for Italy, Dan Eliasson for Sweden and Daniel Flore for Belgium (the latter two were both delegates

from their countries for the K4 Committee). Flore, also the Belgian Minister of Justice (because of his geographic position) in Brussels, has been involved in European affairs for the longest period of time (1985).

The entry into force of the Amsterdam Treaty (May 1999) occurred during the Finnish Presidency, which was the first European Council entirely focused on issues of ‘Justice and Home Affairs’. In this context, the Council General Secretariat greatly benefited from the support of the Finnish Presidency. Within the GSC, the Kerchove/Nilsson double act assembled a small team to test their ideas about the proposed European Judicial Co-operation Unit, which had already been mentioned at the end of the 1996 Irish Presidency. The name ‘Eurojust’, in reference to Europol, came up during these informal discussions. As a result, a network of professional, personal and even friendly relationships began. Moreover, with some involvement from universities in Belgium,<sup>12</sup> this network was associated with an editorial strategy within the ‘European Studies’ collection of some publications by the University of Brussels. In this relational system, the two parts are transformed by reciprocal interests. Those of Kerchove and Nilsson were about developing the role of the General Secretariat, drawing on national expertise and somehow understanding – before the negotiations – how an agreement is most likely to be reached. The Legal Advisors, who held magistrate posts dealing with highly technical issues, were interested in fostering institutional co-operation.

At this point, it was important to see the project endorsed by the Finnish Presidency, which was in control of the initiative and the agenda. The highly specific role that the General Secretariat plays in the preparation of European Councils was pushed

<sup>10</sup> One should also note the culture shock for the Interior Ministries of ‘TREVI’ co-operation within the EU, and the compliance of the decision-making process with the rules and procedures of the Council, as Kerchove remarked: ‘*the police are, by nature, more oriented towards operational action than legislative deliberation. As the Council of Ministers is basically an institution that sets the standard, the police are less at ease there than their colleagues in the Ministries of Justice, who assume the primary responsibility. One of the challenges to overcome consists of creating certain procedures and devising methods that allow those in charge of the European police to co-ordinate police operations at EU level, and to be involved in defining a European criminal policy*’ (interview, July 2002).

<sup>11</sup> Note from the Presidency to COREPER/Council, Brussels, 22 November 1996.

<sup>12</sup> For example: the Université Libre de Bruxelles, the Catholic University of Louvain and the Facultés universitaires Saint-Louis for Kerchove; the College of Europe in Bruges for Nilsson; and the Catholic University of Louvain for Flore – a former assistant there.

to its limits. The work consisted of drafting the conclusions of the Presidency in the preceding months. In this process the situation is still more specific, since a European Council does not bring together the Ministers of Justice. Consequently, an informal meeting of the Ministers of Justice and the Interior took place in Turku, Finland (September 1999), one month before the Tampere Summit – a consultation of ‘sectoral’ ministers preparing the European Council. This informal meeting concluded with the first official political recognition of Eurojust. The team for the DG JHA was assisted by former member of the German Ministry of Justice and member of the cabinet of the GSC, Jürgen Trumpf.<sup>13</sup> The words of one member of the Council General Secretariat further explain the situation:

*‘For the debate on the first morning, we prepared a series of questions about reaching consensus on the creation of Eurojust. We were quite surprised to see that not a single minister even mentioned the idea. Since we knew that the German Minister of Justice was sold on the idea – she had been persuaded by a German senior magistrate [Wolfgang Schomburg] – we went to speak to her before lunch to express our astonishment. We had also drawn the attention of the advisor for the French Ministry of Justice, who was also quite keen on the idea as well. When we went back to the negotiations – although they were focused on the issues of immigration and asylum – the German Minister of Justice took the floor again and insisted on the importance of creating Eurojust. Elisabeth Guigou followed with her support, and after her intervention, twelve other Ministers of Justice indicated that they found the idea interesting. This helped to convince the Finnish Presidency to add the principle of the creation of Eurojust to the conclusions of the Tampere European Council. Finland didn’t actually see the need; its judicial system didn’t foresee a particular role for the prosecution during the phase of investigation and inquiry’.*<sup>14</sup>

<sup>13</sup> The German diplomat was, however, on the way out: he was replaced just after the Tampere Council (18 October 1999) by the duo of Javier Solana, as Secretary-General/High Representative for the CFSP, and Pierre de Boissieu, Deputy Secretary-General.

<sup>14</sup> Interview (July 2002).

This is a clear indication of the complex game played by the agents of the General Secretariat. Their position allows them to promote ideas, according to the circumstances, or to advise the Presidency or the national delegations more easily since they do not have a single, clearly defined institutional role (e.g. a Presidency can do without any help that is not purely logistic from the GSC). Thus, the agents of the GSC contribute to placing projects on the agenda.

This working ability is also due to the flexibility of the administrative organisation of the Secretariat, which does not have (according to some of our interviewees) the same bureaucratic complexity as the Commission. As a member of the GSC explains, ‘we don’t need to consult multiple people: we form a proposal for the Presidency – who either takes it on or doesn’t and then submits it – and that’s all. It takes two days. In the Commission it takes six months, because it’s like a machine with a hierarchy, a legal service, the cabinet and the college’. A weakly codified organisation like the Secretariat can act more efficiently in an uncertain institutional configuration. This does not mean, however, that conflicts do not occur. There was, for example, the internal divergence with regard to Eurojust in the GSC between the DG JHA and the Legal Service – namely with Julian Schutte as director, who directly dealt with Nilsson in the Council of Europe (Strasbourg) when he represented the Netherlands.

Another example is the imposition that placed Eurojust on the agenda. This imposition is not always applied to all topics: for example, another proposal from the GSC – the creation of a *grande école* for European magistracy – was not adopted since there was neither a minimum consensus in the Presidency, nor in a majority of the Member States. There was also the Franco-German support (which the GSC sought beforehand) that helped Eurojust appear in the conclusions of the Tampere Summit. In this first game, the General Secretariat seemed to have been at the centre of the intellectual and institutional configuration. It was in these interactions

between different Presidencies that the formal proposal to create Eurojust appeared.

### The phase of the four Presidencies

The second game is that of the EU Presidency, where the formal proposal for Eurojust was co-ordinated. More precisely, this included four Presidencies – Portugal, France, Sweden and Belgium – and even a fifth, if the rival initiative from Germany is considered. In this game, the General Secretariat could no longer play the main role in the process. Instead, the role of the Presidencies was the determining factor; insofar as each one sought to advance its own priorities in order to see its projects succeed.

The Portuguese Presidency wanted to put a proposal on the agenda that would immediately achieve a degree of consensus. The Portuguese called for a meeting at their Permanent Representation and invited the three subsequent Presidencies – France, Sweden and Belgium. While hoping to rely on its other partners in order to assure a warm reception for its project, the Portuguese Presidency was also bound by the objective of Tampere. The guidelines imposed by the Heads of State and Government in Tampere (or more precisely, by the General Secretariat) were extremely precise on a formal level, since they indicated that the Council should adopt the necessary legal instrument before the end of 2001, i.e. during the Belgian Presidency. The informal contacts developed before Tampere on the initiative of the GSC were formalised by these guidelines, which bound the Presidencies to prioritise them during the given time and in successive order (Portugal, France, Sweden and then Belgium). From this perspective, Kerchove's statement is relevant: 'three or four delegations from the Member States got together in order to draft the plan that their respective countries would put forward, i.e. France, Sweden, Portugal and Belgium'. The influence of the GSC, therefore, is applied through the effects of anticipating the European calendars in the management and planning of the agendas,

while taking into consideration the increasingly longer period of time that Brussels takes to make decisions.

The institutional space, however, is definitely in the domain of the Presidency, or in this particular case, of the four Presidencies. The move made in Turku could only be played once. It fell upon the Portuguese Presidency to lead and co-ordinate the preparatory works through a joint initiative. It was a member of the Ministry of Justice in Lisbon (not of the Permanent Representation in Brussels), Theresa Alves Martins, director of international relations, who became the co-ordinator. The Presidency chose an open formula of initiating discussion on a series of options. On 4 February 2000, it submitted some scenarios to the Article 36 Committee,<sup>15</sup> specifically concerning how to determine the extent of Eurojust's jurisdiction *ratione materiae*, and how to define its powers. On this basis, a questionnaire was given to the Ministers of Justice during an informal meeting in Lisbon (from 3-4 March 2000).

It was not until the French Presidency, starting in July, that a finished text was submitted to the Council (20 July 2000).<sup>16</sup> Published in the Official Journal on 24 August, it was signed by the four Presidencies.<sup>17</sup> This initiative provided for the institution of a Judicial Co-ordination Unit – 'Eurojust' – to be composed of one national representative from each Member State, having the status of prosecutor, magistrate or law enforcement officer, and for all types of crimes affecting two or more Member States that would necessitate co-ordinated action by judicial authorities. Its jurisdiction *ratione materiae* is precise: types of crimes and

<sup>15</sup> This is the body in charge of co-ordinating judicial and police co-operation (formerly the K4).

<sup>16</sup> Council documents 10356/00 EUROJUST 7 & 10357/00 EUROJUST 8. It should be noted that the General Secretariat of the Council was the original author of this text.

<sup>17</sup> Initiative from Portugal, France, Sweden and Belgium in preparing to adopt the Council decision establishing Eurojust so as to be able to better combat serious types of organised crime (OJ, C243, 24 August 2000).

offences covered by the Europol Convention; trafficking in human beings; terrorist acts; protecting the euro; protecting the financial interests of the Community; money laundering; and computer crime and other forms of crimes relating to the listed offences. Furthermore, it makes the provisions that Eurojust can request (in a non-binding manner) that a Member State undertake an investigation or proceedings in a precise case, or that several Member States co-ordinate their investigative and procedural activities. If a Member State refuses to carry out an investigation, it must justify its decision. Finally, the text states that Eurojust shall have a legal personality, and shall be headed by a president and two vice-presidents – all chosen by the Council from the Member States. However, the text from the four Presidencies prepared during these months was preceded by a German proposal, which was submitted a month beforehand and without consulting the four Presidencies. On the 19<sup>th</sup> of June, with short notice, Germany formalised its own proposal on Eurojust (published 19 July),<sup>18</sup> being logically in the conditions of power claiming a certain right of initiative, even of authorship.<sup>19</sup> On the initiative of the German co-ordinator on the Article 36 Committee, the text stated that each Member State shall designate one or more magistrates, prosecutors or law enforcement officers who will form Eurojust, and who shall be called ‘liaison officials’. Thus, Eurojust is a sort of grouping of liaison magistrates for a single purpose, which is to make enquiries about the state of procedures and to contribute to the co-ordination of investigations. It does so, however, without its own structure, since the GSC is responsible for providing the material and human resources for Eurojust (e.g. interpreters, translators, and additional staff).

<sup>18</sup> Initiative from Germany in preparing to adopt Council decision relating to the creation of a ‘Eurojust’ unit (OJ, C206, 19 July 2000).

<sup>19</sup> Because of the former role played by Schomburg in ‘launching’ the idea in 1991 with Nilsson and, particularly, with his Minister in Turku in September 1999.

Although the connection to the discussions with Schomburg is clear (who is an advocate of a single centre for documentation), the initiative aimed, in particular, to provide its own definition of an initial text, and to define a framework with the least amount of discussion. The reactions from the General Secretariat and the four Presidencies were animated: a meeting was held at the Permanent Representation for France in order to convince the German Representative to withdraw the proposal. In the end, however, two divergent initiatives were left on the table for the Council. The plan of the four Presidencies was an initial compromise between the four, before having to have it accepted by the fifteen Member States. In fact, in the pre-negotiations, the Belgian representatives made it clear that they wanted a more ambitious programme, especially so as to avoid the dual model of Europol. According to Flore:

*‘Clearly, the Belgian option at that time was that it should be a matter of European magistrates; that we shouldn’t make the same mistake as was made with Europol. We had liaison officials close to Europol which are basically the real source of information, and the Europol directorate had a duality; a permanent tension between the European and the national levels within Europol. The idea, then, was that the magistrates should not be national, but European. Along with that, France and Sweden wanted connections to the States. The argument in the negotiations was that, since the Germans were talking about liaison magistrates, we can’t oppose it. The concept of Eurojust national member came up, which is both a member of Eurojust and a national member. In the decision-making process, we saw that in some aspects, it’s truly a European magistrate, but in other essential aspects, it’s a national magistrate who can consult his State. From the discussion among the four Presidencies, there was this question, which was settled by a type of hybridisation: national member’.<sup>20</sup>*

<sup>20</sup> Interview (May 2003). See also his article: Flore 2002. His exact example (p. 16) states that liaison officials are ‘foreign bodies’ in the European unit; while the Europol directorate, i.e. the director, deputy directors and staff, are guarantors of European interests.



This explains how Europol – after having been a key factor in the creation of Eurojust – played the role of institutional ‘counter-model’. Behind this argument, there was also a will to demonstrate the highest level of efficiency between judicial and police co-operation. The ‘real’ negotiations began as such at the beginning of October 2000 on the basis of two philosophically different texts. Having participated in the discussions and the proposal as Justice Advisor to the Staff representatives (Permanent Representation), Emmanuel Barbe assumed (in accordance with the rules of the Presidency) the leading role of the ‘Judicial and Criminal Co-operation’ group. Two principal dynamics are at play here. First of all, the issue is naturally the basis of negotiations found within the first pillar in the Commission, which in this framework has, as Pierson shows (Pierson 1996), the possibility of choosing the opportune time to submit a text. Barbe’s strategy was to progressively narrow the choices down to a single text – the one from the four Presidencies.<sup>21</sup> The second dynamic concerned the group’s structure, in short, to create a specific body to negotiate for Eurojust. In this case, there was a will to create a high-level group with ‘less junior’ negotiators who had ‘more vision and skills that were more organisational than strictly legal’. ‘We created a body, an institution,’ Barbe remarks. The manager of the Criminal Co-operation group, a Danish A4 (AD12) technical expert on Community law, was then replaced by Nilsson, head of division (AD14). It seems that this file is thus considered somehow as the most ‘noble’ aspect in judicial co-operation – for the occasion, dinners were even organised. This adheres to the logic of the sectoral nature of Eurojust.

The DG JHA of the Commission is usually absent from this game. Developed more recently, made up of a strictly administrative composition and only having

some judicial expertise available to it, the DG JHA has not made a formal proposal before September 2001. The DG JHA is primarily involved in ‘communitised’ areas, e.g. asylum, immigration and civil co-operation. Nevertheless, in Tampere it received the legitimacy to intervene in criminal matters. It is therefore revealing that the Commission Representative within the working group in charge of Eurojust negotiations is not one of its officials, but a seconded national expert (SNE).<sup>22</sup>

### The independent game of the Commission

If the Commission is truly absent from the two games described above, it is certainly because it is not set up to be an actor in criminal and judicial co-operation, but also because it is involved in another game: one that is focused on protecting the Community’s financial interests and combating fraud. It is in this context that the Commission proposed, on 29 September 2000, establishing a post of a European prosecutor who could act as a valuable instrument and as a supporter of Eurojust. This proposal was made by the Commissioner in charge of the budget portfolio, financial control and anti-fraud activity, Michaele Schreyer – not, in fact, by António Vitorino, Commissioner for JHA.<sup>23</sup> This initiative is to be interpreted autonomously within the rather complex relational system between the Commissioner for the budget, OLAF (European Anti-Fraud Office), which succeeded the Unit for the Co-ordination of Fraud Prevention (UCLAF, then part of the General Secretariat of the Commission) in 1999,<sup>24</sup> and the European

<sup>21</sup> During its meeting (5 September 2000), the Article 36 Committee had asked for the working group to proceed from an analysis of the two texts and to combine them into one.

<sup>22</sup> Martin Wasmeier, German prosecutor (having since integrated the services from the Commission).

<sup>23</sup> These two portfolios were both previously handled by a single person: Commissioner Anita Gradin from Sweden, who had very little authority.

<sup>24</sup> Initially established as ‘UNCLAF’, OLAF received independent status on 1 June 1999 in order to conduct internal (i.e. all EU bodies and institutions) and

Parliament and its Budgetary Control Commission (COCOBU). There is an obvious German influence in this game: OLAF is headed by former German prosecutor Franz Hermann Brüner; the Budget Commissioner is Michael Schreyer, who is an expert in budgetary policy, a member of Germany's Green Party and has a former member of the Ministry of Justice in Berlin, Margarete Hofmann, as her main advisor; and COCOBU's president is Diemut Theato from the Christian Democrats (CDU).

The Commission adheres to a very different logic from the one that governs police and judicial co-operation (although OLAF's director was originally a criminal judge), and is under the influence of the European Parliament, which votes on OLAF's budget and originally came up with the idea of having a Prosecutor in 1996. The specific project was outlined for the first time in 1996 by Klaus Hansch, then president of the Parliament. OLAF, and particularly its director of 'political, legislation and legal affairs' Claude Lecou (founding member of UCLAF), who was also very interested in the idea of a Prosecutor to deal with non-administrative issues in his investigations – the likes of which COCOBU carefully follows. There was also a juridicisation of the OLAF, symbolised by the establishment of the 'Magistrates, Judicial Advice and Follow-up' unit, which is composed specifically of magistrates and directly attached to the Director-General, and which has become increasingly influential. The main obstacle for OLAF is the fact that it does not have a legal personality.

The logic of this game has roots that can be traced back to the Eurocrim treaty, to the 'protection of financial interests' convention in July 1995 and, in particular, to the first studies during the 1990s that concluded with the *Corpus Juris* (1997) and the *Corpus Juris 2* (2000). However, the Commission's recommendation for a Prosecutor happened during a specific event:

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external (i.e. all recipients or debtors of Community funds) anti-fraud investigations.

the Intergovernmental Conference in charge of amending the treaties.

### **The IGC: combining games & hardening cleavages**

Since the Commission's proposal was formed during the IGC, it had the effect of considerably increasing opposition between the two projects. In this competition, Eurojust seemed to be the only serious initiative for judicial co-operation. The Commission's Prosecutor project offered the French Presidency (in charge of negotiations until Nice) the opportunity to propose Eurojust as a structural solution to the Commission's proposal within the IGC's framework, and to see it written into the new treaty. This specific game did not include certain high-level national actors (e.g. advisors of the Ministries of Justice, teams of the Heads of State and Government), and for the first time, the General Secretariat of the Council was entirely absent.

Here one actor seemed to play a decisive role: Michel Debacq, advisor for international affairs to the French Ministers of Justice (Elisabeth Guigou, then Marylise Lebranchu). Debacq had been appointed to the post of French liaison magistrate in Rome in March 1993,<sup>25</sup> where he had contacts in socialist circles at his disposal.<sup>26</sup> His contribution was thus essential when the Guigou and then the Lebranchu cabinet (following the reorganisation of the Jospin government in mid-presidency) – relying on the Ministry's Department of European and International Affairs (SAEI) then headed by Oliver de Baynast – took the important initiative of writing the provisions of Articles 30 and 31, which legally enshrine Eurojust in the Treaty. The argument of the French Presidency mentions this in the Treaty so as to better balance judicial and police co-

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<sup>25</sup> He wrote a paper on the expérience (Debacq 1995).

<sup>26</sup> Appointed in May 2001 to the head of the anti-terrorist section of the Paris prosecutor's office, he was fired on 1 March 2004 following the *AZF* affair.

operation. This balance was ‘topographically’ assured in the Treaty with the insertion of a new point 2 (Eurojust): Article 31 on judicial co-operation, which corresponded to point 2 in Article 30 (Europol) on police co-operation.

While this issue did not figure into the IGC’s mandate, this initiative should be understood as an attempt to answer the Commission in order to reject the Prosecutor project. It is in terms of ‘anti-Prosecutor’ that the French position was then compromised. The General Secretariat of the Council was left out of this initiative: ‘We just heard after France’s proposal during the IGC and that it had been successful’, Nilsson remarked, who otherwise judged the initiative to be excellent. Kerchove, on the other hand, was disappointed that his draft had not been included. He thought that the proposed text referred to some concepts that were outdated, like extradition, and that it ‘still bore the marks of the former approach of a judicial Europe’. This indicates the specific nature of the IGC’s game that – due to the increasingly high level of decision-making – momentarily left out certain actors in Brussels.

The French initiative provoked a degree of uncertainty in the Commission, as the explicit reference to the protection of the Community’s financial interests (PFI) caught its attention. As a member of OLAF’s policy directorate (the division of the office under the Commission) recalls, ‘it seemed dangerous to mention it in this particular way – in the chapter on Eurojust at that time. At the very least, it seemed to introduce some confusion, blurring plans and ideas. At worst, it seemed like calling into question an *acquis communautaire*. So, at that moment, the Commission was mobilised’. The mobilisation of the Commission consisted of an approach from Schreyer, alongside her colleagues who followed the IGC, and an intervention from Mireille Delmas-Marty (President of OLAF’s Monitoring Committee), who wrote about this subject to the Prime Minister and the President of France in order to inform them of her committee’s concern. This was not mentioned

in the actual Treaty, only in the Eurojust recommendation.

This opposition between, in one camp, the French Presidency and the Member States, and, in the other, OLAF and the Commission, considerably hardened. Some rumours circulated about OLAF being a potential recruitment breeding ground for a European Prosecutor, and even a few that were about OLAF having the ambition to transform itself into the role. For its part, the Office defended itself, affirming that it ‘perceived itself as a department for investigations – possibly evolving into a department for judicial investigations, or being under the control of a judicial Community body – but not as directly assuming the role of Prosecutor or of a prosecution department’.<sup>27</sup> The latter adheres to a different philosophy towards the two projects:

*‘The Commission proposed very ‘integrated’ powers; an ambitious idea in terms of Community integration. But we started from a limited field of functional competence. Instead, as far as constructing Eurojust was concerned, it was the opposite: a very large field of competence, but with a slow rise in power in terms of competences at European level. These are, in fact, two approaches that cross each other: one horizontal, the other vertical’.*<sup>28</sup>

This cleavage was particularly exacerbated by the press. An article from *Les Echos* at the end of February 2001 was in favour of a European Prosecutor (as included within a Prosecution service), and was presented as a model project against Eurojust, to which the following flaws were attributed:

*‘As the Dumas-Elf-Sirven and Angolagate affairs caused scandals with their possible connections to Germany or because of their Swiss bank accounts, it is certain that Europe has not made up its mind to unify its judicial arena. It prefers to conjure up solutions as it goes along! In December in Nice, we expected a European prosecution – and it was Eurojust that was pulled from the collective hat of the Heads of State and Government of the EU-15.’*

<sup>27</sup> Interview with Sébastien Combeaud, member of OLAF’s policy directorate (July 2003).

<sup>28</sup> Interview (July 2003).

*France convinced its partners to place Eurojust into effect from the 1<sup>st</sup> of March. However, in the eyes of a majority of MEPs and Commission officials – who placed their bets during the Intergovernmental Conference (IGC) with a plan for a European prosecution, in line with a debate on harmonising European criminal law (i.e. Corpus Juris) – Eurojust is an illusion... For it was necessary to amend the treaties in order to create a European prosecution; it was not because of a need for Eurojust – which is simply an inner circle of magistrates from the Ministries of Justice of the EU-15. And yet, it was enshrined in the Nice Treaty, as if it were tucked into a bed tailor-made for a European prosecutor...<sup>29</sup>*

This article plainly attests to the capacity of the Commission (and its cabinets of commissioners) to mobilise journalists, and it provides a clear example of the hardening of the opposition on both sides of the cleavage created by the IGC. Yet, it is essential not to think of the Commission as a homogenous group, as it is laced with internal tensions. In this instance, here the cleavages are found between, on one side, the cabinet of Schreyer, the DG Budget and OLAF; and, on the other side, the DG JHA, led by Commissioner Vitorino. Those in the second camp are much more open to the idea of Eurojust, and even sometimes critical of the Prosecutor project. As such, the Commission notice on Eurojust (22 November 2000) drafted by the DG JHA is rather measured.<sup>30</sup> As part of the introduction states: ‘While not ruling out the possibility of presenting a proposal on that subject, the Commission has preferred to adopt a position in the form of a communication’.<sup>31</sup> This is an unusual approach, as its author Martin Wasmeier (Representative of the Commission in the working group) acknowledges. The

Commission proposes, of course, a certain sharing of tasks with OLAF, but it simultaneously affirms the urgent need for an ambitious project: ‘The Commission believes that Eurojust should mark a further qualitative step in closer judicial cooperation and go beyond the work carried out by the European Judicial Network’. Its recommendations concerning the character of Eurojust are similar: ‘The unit should be given legal personality and its own budget in order to guarantee a certain degree of independence and autonomy’. Finally, the communication requests the presence of a delegate. Only this last request – a classic institutional demand – was not accepted; above all due to the consensus of the Member States aiming to exclude the Commission from all operational judicial undertakings. The DG JHA’s position was primarily to make sure that Eurojust appeared in the Community’s plans for everything that concerns the institutional character, and not attain a special status vis-à-vis the other agencies (e.g. Europol) as a result.

In addition, these same cleavages exist in the European Parliament and its two competent committees: COCOBU and the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs. The former committee supports the Prosecutor position, and is reserved towards Eurojust. The stance of the second committee is the opposite, and is the one taken by the Parliament. Led by the rapporteur of the project Evelyne Gebhardt, a group of MEPs was in charge of writing a report on the proposal of the Council concerning the establishment of Eurojust. Its favourable reception by this Parliamentary Committee is therefore not surprising. The Committee’s report states (27 April 2001): ‘The development of judicial co-operation in criminal matters to mirror Europol’s competences is a requirement of the rule of law. Eurojust should be designed in such a way as to become the initial stage of a future European public prosecutor’s office’. The only recommendation from the Parliament was about the role of police officers as national members of Eurojust. The Parliament

<sup>29</sup> Royo M., « L’Europe judiciaire à reculons », *Les Echos*, 21 février 2001.

<sup>30</sup> Commission Notice on the creation of Eurojust [COM(2000)746 final – not published in the OJ], 22 November 2000.

<sup>31</sup> Interview (July 2003). See also, ‘Communication from the Commission on the establishment of Eurojust’, *Europa.eu*, 07.09.2005, <<http://europa.eu/scadplus/leg/en/lvb/l33144.htm>> [accessed 18 Nov. 08] (§ 3 of 15).

wanted to reserve this possibility for only the States in which the tasks of the prosecutors are handled by the police.

The Parliament played the most important role with the support of another Committee in the Prosecutor project, which served as a counter proposal for the French Presidency during the IGC. The paradox of Eurojust (at that point, not yet in existence or established in the Treaty) can only be understood through the specificity of the IGC's game. The isolated move made by the French Presidency within the French governmental space – which caused some structural effects in the Commission's game – would not have been possible in another configuration.

### **The conclusion of negotiations: the reversed game of the Council**

The final game was played by the Council and its components: the working group, the Article 36 Committee (CATS) and the Council of Ministers of JHA. Partially resulting from the four preceding ones, this game concerns a decision made in an agenda heavily influenced by September 11<sup>th</sup> (the decision is in fact dated 6 December 2001). Here the structure of decision-making is reversed, since these are officials within a group who are supposed to conclude negotiations; whereas, in general, they also initiate them. This game manifests itself in two forms: firstly, in an initial stage of negotiations in the provisionally named 'Pro-Eurojust' Unit (concluded in December 2000); and secondly, the stage of negotiations on the final decision that was made on 6 December 2001. Another specific feature of the Eurojust negotiations rests with the fact that a part of the initial debates were in reality on the establishment of an experimental, provisional Unit that foreshadowed the final institution. Once again, the origin of the idea goes back to the General Secretariat of the Council. Here is the story we were told in the Secretariat:

*'We thought that it would take too much time to create Eurojust, like the five years that we waited for Europol. It was during the French Presidency, and we were working on a provisional unit while waiting for the text establishing Eurojust to be completely worked out and adopted... One afternoon, we drafted a short plan for the creation of the unit, and we sent it to the Minister of Justice, Elisabeth Guigou'.<sup>32</sup>*

Without wishing to support either side in the endless debate over the origin of the ideas, it was once again the leadership of the GSC who intervened through its role of facilitator and political advisor – this time during the French Presidency. Here again, the GSC's move was one of an exchange of courtesies, rather than that of an imposition, which is institutionally impossible.

The logic of institutional imitation – following the Europol model that had started, in 1994, an anti-drug unit before its definitive establishment in 1999 – worked well in this game. This also corresponded to both the pressure on the Presidencies who want to see important projects come into effect during the short period of the rotation (six months, or five if one excludes August), and to the French Presidency's desire to take advantage of the momentum of Tampere. This institutional 'recipe' also allowed for an intelligent response to be put forth, and an exit strategy to Germany's rival proposal. The following quote is an example of the mobilised argument: 'As your project is 'light', it will be for the Pro-Eurojust; the real Eurojust will come after'. The central idea, however, was to reinforce Eurojust, rendering it inevitable, and to lead the negotiations towards a definitive Unit as Kerchove states: 'The presence in Brussels of a unit of 15 magistrates was useful for us in order to establish an institution that meets the real needs of the practitioners of judicial and criminal assistance'.

In any case, this project was considered to be safe by the Member States, and the negotiations soon made progress. The

<sup>32</sup> Interview (May 2003).

Ministers of Justice gave their political endorsement of Pro-Eurojust at an informal meeting held in Marseille at the end of July 2000. The negotiation unfolded within the framework of the high-level Article 36 Committee, which gathered some senior officials from Justice and Interior. The decision was adopted by the JHA Council on 14 December 2000, a few days after the Nice Summit, and was directly applicable to all Member States. The only opposition came from the Commission (DG JHA), which argued that there was no urgency, and that this transitional solution would not be able to last. This position was relayed by the rapporteur of the project in the Parliament.

The immediate outcome came on 1 March 2001 within the General Secretariat of the Council, with 15 magistrates forming Pro-Eurojust. Until the adoption of the definitive instrument, the Unit was led by the National Representative of the State that held the EU Presidency (Björn Blomqvist, Sweden). France chose Olivier de Baynast as its representative, until then head of SAEI. There was enthusiasm in the air. Nilsson organised a dinner that evening at his home, and recalls: 'There were a lot of people and it was really almost euphoric. It was: 'Now, we have created something''. The specific nature of institutional creation arises here again, as does a transformation of the modalities of judicial work. In fact, many members of Pro-Eurojust came to Brussels having met with difficulties in carrying out their duties, and then being able to be a part of a Community body.

After the provisional unit was set up, all that remained was to negotiate the final decision. Two Presidencies were left following the timetable scheduled in Tampere – the Swedish and the Belgian. Negotiations were taken up again in the Council's working group (for judicial and criminal co-operation), joined in a restricted Eurojust session with Barbe. The increasing influence further took shape when Sweden appointed Peter Strömberg as president of the Eurojust group. Although the French Presidency essentially served to review the text and identify discussion points, during Nice there was still

an absence of consensus – except for the general missions, competencies and structure (National Member and College). The negotiations began with the Swedish Presidency and were more concerned with technical issues, especially data protection and the structures (e.g. the audit scheme and the administrative director).

The Belgian Presidency concluded negotiations. The process of raising the profile of the president of the Eurojust group continued. Flore, who followed up on all the negotiations, now chaired both the Eurojust group and the high-level Article 36 Committee after the internal change of the Belgian Minister of Justice. He intended to reassert himself with regard to the GSC. In order to come to a decision at the end of his presidency, he planned no less than thirteen days of meetings, which was more than had been held by all three of the preceding Presidencies regarding criminal co-operation. He also used his position as president of CATS to emphasise the group's responsibilities: 'I started from the idea that all the governments were committed to Tampere, and an official in a working group wasn't supposed to hinder the political will to successfully finish in December 2001'.<sup>33</sup> Nilsson, still the organiser for the group, recalls that he 'never worked less than 80 hours a week during the Belgian Presidency'. He added that 'that was the only time I thought maybe I should put a bed in here'.<sup>34</sup>

In this configuration, September 11<sup>th</sup> made some disputes over Eurojust seem rather trivial, especially since the agenda was quickly overloaded with other projects including: European arrest warrants and the definition of terrorism on a special Council agenda on 20 September; and the special European Council on 21 September. These last two projects, as well as Eurojust, were adopted by the JHA Council on 6 December 2001. On 11 December 2001, in an ironic twist of fate, a case of bad timing or a desire for revenge, the Commission published its

<sup>33</sup> Interview (May 2003).

<sup>34</sup> Interview (July 2003).

Green Paper on the establishment of a European Prosecutor.<sup>35</sup>

The official decision in establishing Eurojust was made on 28 February 2002 and published in the Official Journal (OJ) on 6 March, the date of its entry into force. Its offices (as Pro-Eurojust) were then moved from the GSC in Brussels to The Hague on 10 December 2002. The official inauguration took place on 29 April 2003. The choice of The Hague – due to the presence of Europol<sup>36</sup> – was ratified during the Laken European Council in December 2001, was definitively confirmed by a decision on 13 December 2003.<sup>37</sup> On 14 April 2003, Eurojust finally signed an agreement protocol with OLAF, ruling on the issue of the modalities of mutual co-operation; and then did the same with Europol (9 June 2004).

The Commission's Green Paper on a European Prosecutor is to be studied in light of the last institutional game: the Convention and then the new IGC where the Constitution was born. Indeed, it is in these last two bodies that a second competition took place between the Prosecutor project and Eurojust. This new negotiation gave the advantage to Eurojust. The compromise made by the presidium was to maintain the possibility to create the Prosecutor leading a Prosecution service, but 'from Eurojust' and with unanimity, which ruined its chances. It is this same formulation that was taken up again at the IGC, and was thus part of the Constitution; adopted on 18 June 2004 by the European Council in Brussels, and signed in Rome on 29 October 2004 (Article III-274). At the same time, the text consecrated the existence of Eurojust in its preceding article.

<sup>35</sup> European Commission, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, Brussels, 11 December 2001 (COM (2001) 0715 final).

<sup>36</sup> Luxembourg was the other possible choice.

<sup>37</sup> Decision of the Representatives of the Member States meeting with the Heads of State and of Government, 13 December 2003 (OJ, 3 February 2004).

The decision to establish Eurojust can therefore be explained by a series of five institutional games (or six if the Convention-Constitution game is included). These games involved a plurality of actors, and it is as such that this project – with origins as old as Europol – can have several claims of authorship: German, French or Belgian – according to the involvement of these States in one game or another. Another claim of authorship has even arisen from Italy, which claimed that this institutional model was inspired by their Directorate-General Anti-Mafia. If there were a claim to authorship to look into, it would be that of the General Secretariat of the Council; which is, however, impossible to claim, and is clearly officially linked to many other protagonists. The role of certain national magistrates is also an important factor, since they were anxious to improve institutional co-operation.

Eurojust began its operations in 2002 (2001 for Pro-Eurojust) in Brussels, then in The Hague (located in the same building as the International Criminal Court). Within this framework, it would be useful to continue the analysis by observing the placement of this body and the practices of this institutional creation by the national magistrates – practices that could lead to certain types of re-nationalisation.

However, what is most striking is the permanent debate about its institutional structure. As such, the project of the constitutional text plans a new decision on the definitive definition of Eurojust. The European Council, on 4-5 November 2004, launched the 'Hague Programme', and established that this decision should be adopted on the recommendation of the Commission, which happened in late 2008 during the French Presidency. A re-negotiation took place, which confirmed that institutional innovation is a European speciality.<sup>38</sup>

<sup>38</sup> This characteristic observed for the CFSP by Yves Buchet de Neuilly is far from being specific to this pillar or external policy in a larger sense. See Buchet de Neuilly 2002.

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